Tom Rice Buick, Pontiac & GMC Truck, Inc. ***and*** **Local 355, Service Employees International Union, AFL–CIO.** Cases 29–CA–21826 and 29–CA–21829

July 26, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On May 28, 1999, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge has found that the Respondent violated Section 8(a)(1) of the Act by offering employee Thomas Fell a wage increase if he quit the Union and by threatening to discharge him because of his union membership, but the Respondent did not violate Section 8(a)(3) by later discharging Fell. The judge also found that the Respondent violated Section 8(a)(5) by failing to provide some information and by delaying the provision of other information requested by the Union relevant to the processing of a grievance about Fell's discharge.

There are no exceptions to the 8(a)(1) and (5) findings. The General Counsel excepts to the recommended dismissal of the 8(a)(3) discharge allegation. Contrary to the dissent, we agree with the judge that the Respondent met its burden of proving that it would have terminated Fell even in the absence of his union activity because he closed the parts department and left work early, without notice to or permission from management, and in spite of knowing that a customer needed parts department service.

In early 1998,[3] Fell was a 5-year employee working in the parts department of the Respondent's automobile sales and service store. He was a member of a bargaining unit represented by the Union. Only Fell and four others in the 15-employee unit were union members.

In January 1998, Fell asked Parts Manager Christopher Ditelio for a raise. Ditelio unlawfully told Fell that in order to receive a raise he would have to quit the Union and become a nonunion employee. Later in January, Ditelio unlawfully told Fell that Tom Rice, the Respondent's president, was trying to fire him because he was a union member.

At some time prior to 4:30 p.m. on February 19, Fell received an emergency phone call from his 13-year old son, who asked to be picked up from school following volleyball practice.[4] The school building was closed, and the coach had left the premises. Fell's son was upset at being left alone at the school since windows had been broken by gunfire the prior week.

Fell, whose workday was supposed to end at 5 p.m., was the only employee left in the parts department when his son called. Manager Ditelio had left at 3 p.m. Fell locked the cashbox in the department safe, locked the gates and department door, and proceeded to leave the building. He did not punch out, and he did not attempt to give notice of his departure or request permission to leave from any management official. Rice and Truck Department Manager Jerry Kugel were still on the premises.

Manager Kugel credibly testified that a customer approached him at about 4:30 p.m. and complained that the parts department was closed. The customer had been told that the parts he wanted would be available for pickup until 5 p.m. Kugel went to the parts department with the customer and confirmed that it was closed. Kugel then accompanied the customer outside, where Kugel observed Fell getting into his car. Kugel asked Fell why he was leaving early and told him that a parts department customer was present. Fell told Kugel that he was leaving for a "personal reason." Without further explanation or request for permission, Fell drove away at about 4:45 p.m.

Kugel and the customer then went to Rice. Kugel was unable to obtain the parts for the customer. According to Kugel, the customer became "very, very upset and aggravated," and he left "in a huff" without the parts. Kugel and Rice then observed that Fell had not punched out. Kugel punched Fell's time card at 4:49 p.m.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the date for the provisional notice mailing remedy in the judge's recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997).

[3] All subsequent dates are in 1998.

[4] The dissent obscures the judge's credited chronology of the afternoon's events by stating that Fell received this call not long before Fell's 5 p.m. quitting time. Although the judge did not state a specific time for Fell's receipt of the call, he credited the testimony of Manager Kugel, discussed below, that it was about 4:30 p.m. when a customer complained to Kugel that the parts department was closed. Consistent with this testimony, Fell's son must have called at some time prior to 4:30 p.m.

Later that evening, Fell telephoned Ditelio, and told him why he left work early that day. Ditelio told Fell that "family is number one" and that he did the correct thing. When Fell reported for work the following day, however, he was terminated.

The judge found that the commission of other unfair labor practices by the Respondent established its animus against Fell and the Union, and that the General Counsel had shown that Fell's union membership was a motivating factor in the Respondent's decision to terminate Fell. The judge concluded, however, that the Respondent had met its *Wright Line*[5] burden of proving that it would have terminated Fell even in the absence of his union activity. We agree.[6]

The credited testimony establishes that the Respondent discharged Fell because he closed his department and left work early, without notice to or permission from management, knowing that a customer was present and needed service. It is clear that Fell engaged in the conduct for which he was discharged. As the judge found, Fell himself tacitly acknowledged in his testimony that he failed to do what he should have done. Although Fell may have acted in hasty response to the perceived emergency situation of his son, he made no attempt to explain this situation to any member of management before leaving, even when confronted by Kugel in the parking lot. Furthermore, it is undisputed that Fell's actions inconvenienced and outraged a customer. Given these circumstances, and the absence of any evidence of disparate treatment in the Respondent's administration of discipline, we find that the Respondent has met its *Wright Line* rebuttal burden.

We do not share the dissent's perception of weaknesses in the Respondent's defense. In this regard, the dissent challenges the failure of Rice to testify, the lack of evidence of a rule requiring employees to notify management if they want to leave work early, and the reactions of Managers Kugel and Ditelio to Fell's conduct.

Rice acted as the Respondent's non-attorney representative at the hearing. The General Counsel has not excepted to the judge's failure to draw an adverse inference from Rice's failure to testify. Moreover, precedent holds that an adverse inference "may be drawn,"[7] not must be drawn, and "the decision to draw an adverse inference lies within the sound discretion of the trier of fact."[8] Under the circumstances of this case, including Rice's representation of Respondent, the absence of any factual dispute that Fell's early departure on February 19 is the Respondent's asserted reason for his discharge,[9] and the credited portions of testimony by Fell and Kugel concerning the details of that departure, we would find no abuse of discretion in the failure to draw an adverse inference even if the issue were properly raised before us.

Any argument that the Respondent offered no evidence of a rule requiring employees to notify management if they want to leave work early is similarly unavailing. It is true that the Respondent does not have a formal written rule requiring employees to notify management before leaving work early. However, "no company needs to have a set procedure for what action it will take when adjudicating every single employee problem." *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 778 (7th Cir. 2001). We would think it a matter of common business sense that an employer should reasonably expect an employee to give advance notice of an early departure resulting in the closure of a sales department, but we need not substitute common sense for evidence on that matter. As found by the judge, Fell's own testimony showed that he recognized an obligation to inform the Respondent whenever he intended to leave work early. There is no evidence that the Respondent had previously countenanced early, unannounced departures by Fell or any other employees.

In any event, it was not merely Fell's early and unapproved departure that led to his discharge. It was his failure as well, when confronted by Kugel with the information about a waiting customer, to do anything other than say that he had to leave for unexplained personal reasons. Our dissenting colleague places the onus on Kugel to explain to Fell what he needed to do and the consequences of failing to do it. Absent any evidence that Kugel gave this explicit instruction in the brief time afforded him before Fell drove away, the dissent sug-

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 280 fn. 12 (1996).

[6] Contrary to the statement in the dissent, a finding that the General Counsel has met the initial *Wright Line* burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in Fell's discharge does not mean that the discharge was in fact "*unlawfully motivated*."

[7] *International Automated Machines, Inc.*, 285 NLRB 1122, 1123(1987).

[8] *Underwriters Laboratories, Inc.*, 147 F.3d 1048, 1054 (9th Cir. 1998).

[9] The dissent ventures beyond argument made by the General Counsel in exceptions by declaiming the absence of evidence bearing on the reasons for the Respondent's decision to discharge Fell. It is uncontested that Fell left work early and that the circumstances of his departure were the asserted reason for his discharge. (The Union certainly understood this when making information requests on Feb. 23 and 25.) The General Counsel's case rests on the argument that this asserted reason is a pretext for the real antiunion reason for discharge.

gests that Fell's departure was excused. In this regard, the dissent represents nothing more than an impermissible substitution of our colleague's subjective managerial judgment for the Respondent's. Fell, not Kugel, was the employee leaving work early and an irate customer in the lurch. It simply cannot be maintained, as an objective matter, that the Respondent could not reasonably have expected Fell to take the initiative and a few more moments to explain his situation to Kugel and to arrange for the customer to gain access to the parts department. When he failed to do so, he engaged in misconduct subject to discipline.[10]

Accordingly, in the absence of any evidence that the discipline imposed entailed disparate treatment, we agree with the judge's conclusion that the Respondent met its *Wright Line* burden of showing that it would have discharged Fell even in the absence of his union activity because he closed the parts department and left work early, without notice to or permission from management, and in spite of knowing that a customer needed parts department service. We shall therefore adopt the judge's recommendation to dismiss the 8(a)(3) discharge allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tom Rice Buick, Pontiac & GMC Truck, Inc., Huntington, N.Y., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Huntington, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1998."

MEMBER LIEBMAN, dissenting in part.

The Respondent discharged its employee Thomas Fell, a union member, after he left work 15 minutes early to answer his 13-year-old son's emergency call. The stated reason for the discharge was that he left without telling anyone. However, motivating the discharge was the Respondent's strong antiunion animus. I cannot sustain this harsh discharge, but it is not sympathy that guides my decision. Rather, the Respondent's case has no evidentiary substance. Contrary to my colleagues and the judge, I would find that Thomas Fell was unlawfully discharged for his union activities.

We all agree that in January the Respondent unlawfully threatened to discharge Fell because of his union membership and promised him a wage increase if he resigned from the Union. We all agree that the General Counsel has established that Fell's union membership was a motivating factor in the Respondent's decision to discharge him. But thereafter we part company. My colleagues conclude, as did the judge, that the Respondent established that it would have discharged Fell even absent his union activities. In my view, the strong evidence of unlawful motivation clearly outweighs the evidence offered in support of Respondent's defense.

The basic facts are not in dispute. Fell began working for the Respondent as a counterman in December 1993. The Union has been the collective-bargaining representative of the Respondent's employees April 1995. The Union and the Respondent have been party to a collective-bargaining agreement that does not contain a union-security provision. Fell was one of five employees in the 15-employee unit who was a union member.

In April 1997 the Respondent entered into a formal settlement agreement resolving 21 alleged unfair labor practices. The Respondent agreed, among other things, to offer reinstatement and backpay to certain employees, recognize and bargain with the Union, abide by its collective-bargaining agreement with the Union, rescind unilateral changes, provide requested information to the Union, request the withdrawal and/or dismissal of criminal trespass charges filed against union officials, and grant union representatives access to its facility. In February 1998 the United States Court of Appeals for the Second Circuit entered a judgment enforcing the Board's order. On February 19, 1999, the court issued an order finding the Respondent in civil contempt of its judgment.

[10] We likewise reject the dissent's suggestion that Ditelio somehow condoned Fell's action when Fell called him on the evening of his early departure. There is no evidence that Fell specifically told Ditelio either about the encounter with Kugel or the presence of a customer waiting for parts. Furthermore, given Fell's discredited testimony that he shut down the parts department after 4:45 p.m., rather than at least 15 minutes earlier according to Kugel's credited testimony, we question whether Fell gave the same inaccurate version of events to Ditelio.

In January 1998[1] Fell asked Parts Manager Chris Ditelio for a raise. Ditelio replied that Tom Rice, the Respondent's president, had told Ditelio to tell Fell that he was "locked into" his salary because of the union contract and that Fell would have to quit the Union and become a nonunion employee to receive a raise.[2] About the same time, Ditelio told Fell that the Union employees were "getting the brunt of abuse" from Rice and were not getting "a fair shake." More than once, Ditelio told Fell that Rice wanted to fire Fell because he was a union member and to "get rid of" all union members.

On February 19, Fell received a phone call from his 13-year-old son apparently not long before Fell's 5 p.m. quitting time. His son asked to be picked up at school because his volleyball practice had ended early and he was alone. He was upset since earlier that week the school's windows had been broken by gunfire.

Fell was the only employee working in the parts department at that hour. He put the money in the safe and locked up. He did not punch out or advise Rice that he needed to leave. As he was getting into his car, the Truck Department Manager Jerry Kugel approached. He told Fell that a customer needed assistance in getting a part. Fell said that he had to leave for a "personal reason." Kugel said nothing, and Fell left.

Kugel told Rice that Fell had left early. They punched his timecard at 4:49. They were unsuccessful in assisting the customer who left "very, very upset and aggravated."

That evening, Fell telephoned Ditelio at home and explained he had left work early. Ditelio replied that "family is number one" and that Fell had done the right thing. However, when Fell arrived at work the next day, Ditelio told him he was fired. Fell asked to speak to Rice and explained what had happened. Rice replied that Fell was discharged.

Based on these facts, the judge found that the General Counsel had established that Fell's union activities were a motivating factor in the Respondent's decision to discharge him. He specifically stated that he had no "doubt that Fell believed the call from his son constituted an emergency in that he was left alone at the school building which had been the site of a shooting that week." And he acknowledged that "it may well be that at that time Respondent welcomed the opportunity to discharge Fell." He found that the Respondent explicitly threatened to discharge Fell because of his union membership, and promised him a wage increase if he resigned from the Union. He found that these independent violations of Section 8(a)(1), which occurred in January 1998, also supported the finding of unlawful motivation for the February 1998 discharge. However, notwithstanding the strong case presented by the General Counsel, the judge found that the Respondent met its burden of establishing that it would have discharged Fell even in the absence of his union activities. I disagree.

The Respondent's case falls far short of meeting the *Wright Line*[3] burden. Owner Tom Rice made the decision to discharge Fell, yet he did not testify.[4] Whether or not an adverse inference should have been drawn from Rice's failure to testify,[5] the fact remains that Respondent's evidence in support of its *Wright Line* defense did not include the testimony of the key decisionmaker. Instead, the Respondent's only witness, Kugel, described the events that led up to Fell's discharge. No testimony spoke directly to the Respondent's *motive* and refuted the inference that Fell's early departure from work was just a pretext for his discharge.

On the record here, that inference is virtually compelled. There is strong evidence of antiunion animus. There is also strong evidence of extenuating circumstances excusing Fell's cited misconduct—unless, of course, animus made those circumstances irrelevant to the Respondent.

The misconduct of Fell, a 5-year employee with a good record, consisted of the failure to fully explain his departure *at the time* and the failure to attend to a single customer very late in the day. Of course, Fell *did* tell Kugel that he was leaving for "personal reasons," and Kugel did not object, did not direct Fell to stay and serve the customer, and did not indicate that Fell was doing something wrong.[6] Moreover, Fell offered a fuller explanation of his departure that evening, when he called Ditelio. Ditelio did not find fault with Fell's action. To the contrary, he said that Fell did the right thing.[7]

[1] All dates are in 1998 unless otherwise noted.

[2] The Respondent's answer to the complaint admits that Ditelio was its agent and a statutory supervisor.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[4] Respondent was not represented by an attorney at the hearing. Instead, the judge allowed owner Rice and Jerry Kugel, the parts manager, to cross-examine the General Counsel's witness. Kugel was the Respondent's sole witness. There is no finding, and the record does not show, that Kugel was involved in the actual decision to discharge Fell.

[5] The General Counsel did not except from the judge's failure to draw an adverse inference. Had he done so, I would have been inclined to find an abuse of discretion.

[6] The majority argues that Kugel's failure to confront Fell cannot be relied upon to undercut the reasonableness of Fell's discharge. I disagree. At a minimum, the facts suggest that Kugel recognized that Fell was leaving because he felt compelled to do so. Surely this recognition would have been an important factor in an untainted decision whether and how to discipline Fell.

[7] The majority infers that Fell did not give Ditelio a full picture of the circumstances of Fell's departure, including the fact that a customer was waiting, and that Ditelio would have reacted differently had he

In my view, the Respondent has failed to prove that by its own standards, it had grounds not just to discipline Fell, but to discharge him. But even assuming that the Respondent's approach to discipline was extraordinarily strict, there was insufficient evidence that the Respondent actually would have discharged Fell, in the absence of his union activities. What remains is severe, *unlawfully motivated* punishment of a man put in a tough spot, seeking to do the right thing for his child. Accordingly, I would find that Fell was discharged in violation of Section 8(a)(3) and (1).

James Kearns, Esq., for the General Counsel.
Tom Rice, Huntington, of New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge and a first amended charge filed in Case 29–CA–21826 on March 12 and 30, 1998, respectively by Local 355, Service Employees International Union, AFL–CIO (Union), and based upon a charge in Case 29–CA–21829 filed on March 12, 1998, by the Union, a complaint was issued on June 12, 1998, against Tom Rice Buick, Pontiac & GMC Truck, Inc. (Respondent).[1]

The complaint alleges essentially that Respondent (a) threatened its employees with discharge because of their union activities, (b) offered its employees a wage increase as an inducement to abandon their membership in and activities in behalf of the Union, (c) discharged employee Thomas Fell because of his union activities, and (d) failed to furnish certain requested information to the Union.

Respondent denied the material allegations of the complaint, and on April 19, 1999, a hearing was held before me in Brooklyn, New York. Upon the evidence in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the letter-brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having its principal office and place of business at 305 West Jericho Turnpike, Huntington, New York, is engaged in the retail sale of automobiles and trucks, and the maintenance and service thereof. During the past calendar year, Respondent derived gross annual revenues in excess of $500,000, and also purchased and received goods, supplies, and materials valued in excess of $5000 directly from points located outside New York.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGE UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Pursuant to an election, the Union was certified on April 18, 1995, as the collective-bargaining representative of Respondent's employees in the following unit:

> All full-time and regular part-time service and parts department employees employed by the Employer at its Huntington facility, excluding all clerical employees, salespeople, guards and supervisors as defined in the Act.

The complaint alleges and Respondent's answer admits, that at all material times since April 18, 1995, the Union by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On about November 1, 1995, Respondent and the Union executed a collective-bargaining agreement effective from October 12, 1995, to October 13, 1998.

Thomas Fell began work for Respondent in December 1993. He was employed as a parts department employee whose main responsibilities were to receive orders from retail and wholesale customers, order and obtain parts, and sell and deliver them to such customers.

Fell worked with a part-time employee, Frank McKenner, and was supervised by parts manager, Christopher Ditelio. Respondent's answer admits that Ditelio is its statutory supervisor and agent.

Prior to being employed by Respondent, Fell had been a member of the Union. Upon the certification of the Union as the representative of Respondent's employees, Fell became a member and Respondent deducted union dues from his pay.

In May 1997, Fell sold parts to a customer named Mike Baleona. Baleona was a former employee of Respondent, having left his employment shortly before this sale. Fell charged him the wholesale price for the parts, which was 25 percent above cost. As Fell conceded at the hearing, that price was not correct since Baleona was not a wholesale customer, and had no resale certificate on file with Respondent. Accordingly, Baleona should have been charged the retail price, about 45 percent above cost, plus sales tax.

The sale was immediately brought to the attention of Tom Rice, Respondent's president, who directed that the appropriate price be charged and paid. That was done immediately, before Baleona received the parts, and the retail price plus tax was charged and paid. The difference between the price Fell charged and that ultimately paid by Baleona was $8 or $9.

known. I do not draw that inference. No testimony from Ditelio suggests that Fell misled him. And, if "family [was] number one," as Ditelio said, then presumably the Respondent's officials recognized that sometimes the business and its customers would come second, without severe repercussions for employees.

[1] The complaint originally contained allegations concerning Case 29–CA–21827. On April 5, 1999, the Regional Director issued an Order amending complaint, in which he withdrew those allegations of the complaint.

A written warning was issued to Fell for not charging the appropriate price or tax. At the hearing, Fell attempted to demonstrate that he saved Respondent money by charging the wholesale price, explaining that he could have charged Baleona the trade price, which was 10 percent above cost. Fell conceded, however, that the trade price is reserved for current employees, and Baleona was no longer an employee at the time of the sale. In further explanation, Fell stated that he charged the wholesale price as a "courtesy" to Baleona, but did not ask a manager for authority to charge a wholesale price.

2. The alleged interference with Fell's union activities

Fell testified that beginning in January 1998, he asked Manager Ditelio for a raise. Ditelio told him that he was told by Rice to inform him that he was "locked into" his salary because of the union contract. Ditelio added that in order to receive a raise he would have to quit the Union and become a nonunion employee.

Fell stated that at that time not all the unit employees were required to become members of the Union. Peter DeVito, the Union's executive vice president, testified that the collective-bargaining agreement does not contain a union-security clause. DeVito stated that in February, 1998, of the 15 service department employees, the Union represented only 5 employees.

Fell testified that in about January 1998, Ditelio told him that he believed that the union employees were "getting the brunt of abuse" from Rice, and were "not getting a fair shake." He also told Fell that he (Ditelio) was trying to fire him because he was a union member. Fell further stated that Ditelio told him several times that Rice wanted to fire him because he was a union member, and that he wanted to "get rid" of all the union employees. That remark was made to Fell within 1 to 2 weeks before his discharge.

Fell also testified that former parts manager, Frank Satillius, told him that he was directed by Rice to fire him because he was a union member.

Neither Ditelio nor Satillius testified. Rice, who was present at the hearing, did not testify.

3. The discharge of Fell

Fell's hours of work were 8 a.m. to 5 p.m. On February 19, 1998, Fell punched in at 7:55 a.m. That day, Parts Manager Ditelio left at 3 p.m. and part-time employee McKenner left at 3:30 p.m. his normal quitting time. As a result, Fell was alone in the parts department.

Fell testified that at about 4:45 p.m. he received an emergency phone call from his 13-year old son, asking him to pick him up at school. Although school was closed that week for vacation, his son was at the school for volleyball practice. Practice was supposed to end at 5 p.m. but it ended early that day, and the coach had left. Fell's son was upset at being at the school alone especially since during that week the school's windows had been broken by gunfire.

Inasmuch as it was a "slow" day, by the time he received the call, Fell had already counted the money received that day. He then immediately locked the money in the parts department safe, locked the gates and the parts department door, shut the lights, and walked through the office where he told an "old woman" office employee whose name he did not recall, that he had to leave. The woman did not acknowledge his message, and he left.

From the time of his son's call, Fell estimated that it took him 5 to 7 minutes to leave the building. He did not punch out because he was not thinking about timeclocks at that time due to the emergency, and he did not tell any official at the dealership that he was leaving. He did not tell Rice that he had to leave because he did not see him that day, explaining that "when it is an emergency, I just reacted."

Fell conceded that when he was getting into his vehicle to leave that day, he was approached by Jerry Kugel, Respondent's truck department manager, and was told that he had a parts customer present. As testified by Kugel, Fell told him that he had to leave as he had a "personal thing" or a "personal reason" for leaving, and he left.

Kugel testified that at about 4:30 p.m. that day, a parts customer approached him in the showroom. He said that he was there to pick up parts which had been ordered for him, and which he was told would be ready for him that day and available until 5 p.m. The customer told Kugel that he went to the parts department and found it closed.

Kugel went to the parts department with the customer, saw that it was closed, and then accompanied the customer outside and saw Fell getting into his car. Kugel asked why he was leaving early. As noted above, Fell told him that he had a personal reason, and left.

Kugel told the customer that he would see if there was anything he could do, and then found Rice. Kugel and Rice apologized to the customer, and said that they did not know why the parts department was closed.

Kugel testified in a somewhat contradictory manner that (a) he offered to get the parts for the customer but, (b) he had no knowledge of how to use the parts department computer to locate parts. If Kugel could not locate the parts using the computer, how could he have attempted to get them. One explanation might be that Kugel offered to attempt to do what he could—enter the parts department with Rice's keys and look around for the parts which may have been in an obvious place. I do not agree with General Counsel's argument that Kugel changed his story by first testifying that he went with Rice to punch Fell's timecard, and by later testifying that he attempted to obtain the parts and satisfy the customer and then punched Fell's card. The difference in the versions, if there are any, is insignificant. Regardless of the sequence of events, the important factor is that Fell left without obtaining permission, after learning that a customer was present who needed attention.

Nevertheless, the customer, who was "very, very upset and aggravated" at having to travel 30 minutes only to find that he could not obtain the parts, refused to listen to Kugel's explanations, and left "in a huff" without obtaining the parts.

Kugel and Rice then asked other employees if they knew why Fell left early, and no one had an explanation. They went to the time clock area, and observed that Fell had not punched out. Kugel then punched Fell's time card at 4:49 p.m.

Fell testified that he was not aware that the customer had been travelling to obtain parts that were being held for him, and he also stated that he had no knowledge of that customer's parts. Rice has keys for the parts department, and Fell stated

that on certain occasions, others have been in the service department after it had been locked for the evening.

That evening, Fell phoned manager Ditelio and told him why he left work early that day. Ditelio replied that "family is number one" and that he did the correct thing.

The following day, Fell reported to work, and was told by Ditelio that he was fired. Fell asked to speak to Rice, and told him why he left early. Rice replied that he was discharged.

When asked whether he had ever left work early before February 19, Fell testified that he had "not left early without having —no, I have not left early." He added that he always worked until 5 p.m. or later. His halting answer leaves the impression that he had left work early in the past, but had advised someone in charge.

During cross-examination, Fell stated that his son's school is a 5-to-6 minute drive from the dealership. He rejected Respondent's suggestion that another employee could have been sent to pick up his son since his son had been instructed not to get into a car with someone he does not know, or unless he knows that they were coming to pick him up.

Kugel testified that no office worker fits the description of the woman told by Fell that he was leaving.

4. The request for information

On February 23, 1998, Union Official DeVito wrote to Rice, protesting that Fell's discharge for leaving work 10 minutes early did not constitute "just cause" for termination, apparently under the parties' collective-bargaining agreement. DeVito demanded Fell's immediate reinstatement.

On February 25, DeVito wrote to Rice, requesting the following information, for the purpose of "contract administration":

> 1. A list of all service department employees who were terminated by Tom Rice Buick-GMC since October, 1996 for being late by 10 to 15 minutes or for leaving early by 10 to 15 minutes.
>
> 2. A list of all service department employees who received written warnings for arriving late to start work and all warnings for employees leaving early.

On April 27, DeVito received the following response, sent by Respondent's attorney:

> There are no records indicating that any employee of Tom Rice Buick, Pontiac, GMC Truck, Inc. has been disciplined or discharged for leaving work 15 minutes early. Assuming you are making this request with respect to the discharge of Thomas Fell, I remind you, as Mr. Rice has already told you, that Mr. Fell did not merely leave work early. He closed down the parts department, affecting both retail customers and the mechanics working in the shop that day.

Apparently in view of the fact that Respondent did not have information concerning employees leaving work early, the complaint alleges only that Respondent failed to furnish "a list of all service department employees who were terminated . . . since October 1996 for being late by 10 to 15 minutes, and a list of all service department employees who received written warnings for arriving late to start work."

III. ANALYSIS AND DISCUSSION

A. The Prior Cases

Respondent and counsel for the General Counsel executed a settlement stipulation, approved by an administrative law judge and by the Board, which issued its decision and order on October 29, 1997. The order, which provided for the entry of a consent judgment by a court of appeals, required Respondent to cease and desist from committing certain unfair labor practices and ordered it to, inter alia, offer reinstatement to certain employees, make employees whole for losses of pay, abide by the terms of its collective-bargaining agreement with the Union, request the Suffolk County District Attorney to withdraw and/or dismiss criminal trespass charges against union officials, make the Union whole for legal expenses in connection with the defense of such charges, grant access to its facility by union officials, recognize and bargain with the Union, rescind unilateral changes in employees' terms and conditions of employment, and provide requested information to the Union.

On February 11, 1998, the Second Circuit Court of Appeals entered its judgment enforcing the Board's Order. On February 19, 1999, the court found Respondent in civil contempt of its judgment in certain respects and issued an order requiring Respondent to purge itself of its contempt.

At the hearing, counsel for the General Counsel offered in evidence the Board's Order and the Court's Judgment and Contempt Order. I rejected those exhibits on the ground that they did not constitute findings which could be relied upon in this case.[2] The rejection of the exhibits was erroneous, and I hereby receive those documents in evidence. A settlement stipulation which does not contain a nonadmissions clause is "tantamount to an adjudication that the Respondent has engaged in the conduct prohibited therein." *Teamsters Local 945 (Newark Disposal Service),* 232 NLRB 1, 4 (1977*); Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172 (1984).

Those documents are relevant only in determining whether the Respondent has demonstrated a proclivity to violate the Act for the purposes of determining whether a broad remedial order should be issued. *Sheet Metal Workers Local 28 (Astoria Mechanical)*, 323 NLRB 204 (1997); *Operating Engineers Local 12*, supra. As set forth, infra, I shall recommend that a broad remedial order be issued.

B. The Alleged Violations of Section 8(a)(1) *of the Act*

The complaint alleges that admitted Supervisor Ditelio threatened employees with discharge because of their activities in behalf of the Union, and offered its employees a wage increase as an inducement to abandon their membership in, and activities on behalf of the Union.

As set forth above, Fell testified that in January 1998, he was told by Ditelio that he (Ditelio) and Rice wanted to discharge him because of his union membership. Fell further testified that he asked Ditelio for a raise in pay, and was told that in order to receive an increase he had to resign his union membership and become a nonunion employee.

[2] The exhibits were placed in the rejected exhibit file.

I credit Fell's testimony. Fell testified in a straightforward, direct manner about statements which clearly made an indelible impression upon him. Although Ditelio was no longer an employee of Respondent at the time of the hearing and did not testify, no explanation was made as to why he was not produced at hearing. Rice, who represented Respondent at the hearing, also did not testify. Although Rice was not alleged to have made the unlawful statement directly to Fell, he could have testified as to Ditelio's remark that Rice wanted to fire him because of his union membership.

Fell's testimony therefore establishes that Respondent threatened to discharge him because of his union membership. It is axiomatic that a threat to discharge an employee for engaging in rights protected by Section 7 of the Act violates Section 8(a)(1) of the Act. *Delta Mechanical, Inc*., 323 NLRB 76, 78 (1997).

With respect to the offer of a wage increase if Fell withdrew from the Union, Respondent appears to argue that inasmuch as no union-security clause covers its employees, its employees could become members of the Union or not, as they chose. That does not answer the question, however. Fell, already a union member was unlawfully offered an inducement to abandon his union membership.

"It is well-established that an employer violates Section 8(a)(1) by, among other things promising to grant benefits in an effort to discourage union support." *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1329 (2d Cir. 1996). Such conduct constitutes interference with Fell's Section 7 right to remain a union member and violated Section 7 of the Act. *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920, 955 (1997); *Hooper's Chocolates,* 319 NLRB 437, 441 (1995).

C. The Discharge of Fell

The General Counsel has the initial burden of showing that Fell's Union activities were a motivating factor in the decision to discharge him. Once that burden is met, Respondent must establish that it would have discharged Fell even in the absence of his Union activities. *Wright Line*, 251 NLRB 1083 (1980).

As set forth above, Fell chose to become a member of the Union notwithstanding that other unit employees did not become members. He was among a group of only one-third of the unit employees who became union members, thereby distinguishing himself as someone who sought affiliation with the Union. I have found that Fell was the subject of an unlawful threat of discharge, and an unlawful promise of a wage increase if he resigned from the Union. Respondent's animus toward the Union is established by the commission of such unfair labor practices.

I accordingly find that the General Counsel has established that Fell's Union membership was a motivating factor in the decision to discharge him. *Wright Line,* supra.

Respondent discharged Fell for leaving work early on February 19. As set forth above, Fell stated that he received an emergency call from his son asking that he be picked up from school.

I do not doubt that Fell believed the call from his son constituted an emergency in that he was left alone at a school building which had been the site of a shooting that week, and Fell felt compelled to retrieve him immediately.

However, the fact remains that Fell left the job earlier than he was supposed to, there were no other parts department employees on duty, he did not request permission from anyone to leave early, and did not notify anyone in authority that he was leaving, and he knew he was needed at work at the time he left.

Fell's workday ended at 5 p.m. He testified that he received the phone call from his son at 4:45 p.m., and left after 5 to 7 minutes. Thus, at the earliest, Fell would have been at his vehicle at about 4:50 p.m. However, Kugel credibly testified that he confronted Fell at his vehicle, then went to locate Rice, then tried to placate the customer, then asked other employees if they knew why Fell left early, and then finally punched Fell's time card at 4:49 p.m. Based upon this sequence of events, it appears that Fell must have left earlier than 4:50 p.m.

I cannot credit Fell's testimony that he told an unnamed "old woman" in the office that he was leaving. Respondent's witness credibly testified that it employs no such individual. It is doubtful that Fell, having been employed by Respondent for over 4 years, would not know the name of an office employee. Fell did say that Respondent has experienced considerable turnover of clerical employees, but nevertheless could be expected to know the identity of the person to whom he was reporting leaving early.

There was no evidence of any formal rule of Respondent that employees must report to management their desire to leave work early. However, it is undisputed that Respondent expected, and Fell believed he was obligated to inform it that he intended to leave work early.

Thus, Fell testified that he reported to a clerical employee that he was leaving. Second, he phoned manager Ditelio that evening and advised him as to the reason that he left early. *Concepts & Designs*, 318 NLRB 948, 950 (1995). Third, when asked if he had ever left work early prior to this occasion, Fell testified that he had "not left early without having—o, I have not left early." As set forth above, such equivocal testimony (a) does not inspire confidence in Fell's testimony and (b) leads me to believe that whenever Fell left early in the past he obtained permission to do so. Finally, Rice, while cross-examining DeVito stated that although other employees have left work early, they have informed someone that they were leaving early.

I place no reliance on Ditelio's advising Fell that he did the correct thing by leaving early since he did not ask for or receive Ditelio's permission prior to leaving early. *Heartland of Lansing Nursing Service*, 307 NLRB 152, 168 (1992).

Fell attempted to justify his not telling anyone in authority that he was leaving on the ground that he did not see Rice that day, and that he "just reacted" to the emergency. Although he may not have seen Rice that day, Rice was on the premises at the time he left. It would apparently not have taken much effort to locate him, advise him of the emergency, and request permission to leave early. Further, truck department manager Kugel, although he was apparently not Fell's supervisor, was a corporate manager who could have been informed that he had to leave. In addition, Fell's reaction to the emergency did not prevent him, as he testified, from telling the office worker that he was leaving.

Thus, at the time he left, Fell left the parts department unmanned. The other two employees who worked there had already left. I credit Kugel's testimony that a parts customer was present to pick up parts he had ordered and he was told would be ready for him before 5 p.m. Fell corroborated such testimony, in part, by stating that Kugel told him as he was getting into his vehicle to leave, that a parts customer was present.

Nevertheless, Fell left. Although Kugel did not direct that Fell take care of the customer, he implied as much. By seeking him out and telling him that a parts customer was present, Kugel was requesting that Fell obtain the parts. Fell did not tell Kugel that an emergency prevented him from serving the customer. Rather, he simply told him that he had a "personal thing" or a "personal reason" for leaving. As a result, the customer left without the parts.

I do not place reliance upon the fact that Rice had the keys to the parts department and could have obtained the parts for the customer. First, there was evidence that Kugel had no familiarity with that department, and even if he had, he and Rice's attempts to placate the customer and offer to get the parts were to no avail as the customer refused to listen to Kugel's explanations and left in an agitated manner.

Fell's area of responsibility in the parts department was the servicing of retail and wholesale customers such as this customer. When he was leaving he was told that a parts customer was present, but he refused to stay and obtain the parts. Fell's hearing statement that he was not aware that the customer had been travelling to obtain the parts, and that he knew nothing about such parts does not excuse his unwillingness to attempt to see if he could help. He must have known that by leaving, no other parts department employees were present to help, and the customer may not have been able to obtain his parts.

It thus cannot be said that no harm occurred because Fell left only 15 minutes early. The record establishes that he was needed at work at the time that he left in order to obtain parts for a customer, but nevertheless left work anyway. *Soltech, Inc*., 306 NLRB 269, 277 (1992).

No evidence of disparate treatment has been presented. It thus cannot be said that Respondent tolerated instances of other employees leaving work early. Respondent disputes that it discharged Fell for his union activities and maintains that it could have discharged him for charging customer Baleona an improper price. It may well be that at this time Respondent welcomed the opportunity to discharge Fell, but inasmuch as cause for the discharge has been established, I must find that Respondent has met its burden of proving that it would have discharged Fell even in the absence of his Union activities. *Wright Line*, supra, *Hardwicke Chemical Co.,* 241 NLRB 59, 60 (1979).

D. The Request for Information

As set forth above, the Union requested certain information relating to Fell's discharge, specifically, a list of all service department employees who were terminated for being 10 to 15 minutes late for work or for leaving work 10 to 15 minutes early, and a list of employees who received written warnings for arriving late for work, and for leaving early. Respondent's answer to the complaint admits that the Union requested such information, and that such information is necessary for, and relevant to, the Union's performance of its duties as the exclusive-bargaining representative of the unit employees.

Respondent denies that it failed to furnish the requested information. The only response the Union received from Respondent was a letter from its attorney which stated that it had no records indicating that any employee has been disciplined or discharged for leaving work 15 minutes early.

It is clear that Respondent's reply to the Union's request was not timely and it was not responsive.

The reply was sent more than 2 months after the request. No reason has been offered as to why it took so long to furnish the information. Respondent had a duty to furnish the requested information "without undue delay." *Barclay Caterers*, 308 NLRB 1025, 1037 (1992). In these circumstances, where the information was needed in order to process Fell's grievance concerning his discharge, the 2-month delay was unreasonable and violated Section 8(a)(5) and (1) of the Act. *Postal Service*, 308 NLRB 547, 550 (1992).

The request is broader than Respondent's answer. The Union requested information concerning employees arriving late as well as leaving early, and the discipline imposed for such misconduct. Moreover, Respondent's reply only covered instances of employees leaving work 15 minutes early, whereas the request asked for documents concerning workers leaving work 10 to 15 minutes early. In view of Respondent's answer to the complaint that the requested information was relevant and necessary, and it has offered no reason why it has not provided such information, I shall recommend that it be ordered to do so.

I accordingly find that Respondent's failure to provide all the information requested by the Union, and its delay in furnishing the requested information violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By threatening its employees with discharge because of their activities on behalf of the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By offering its employees a wage increase as an inducement to abandon their membership in, and activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and parts department employees employed by the Employer at its Huntington facility, excluding all clerical employees, salespeople, guards and supervisors as defined in the Act.

4. At all times material since April 18, 1995, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By failing and refusing to provide the Union with information it has requested, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By delaying in the furnishing of requested information to the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because of the extensive unfair labor practices engaged in by Respondent set forth in the settlement stipulation which contained no nonadmissions clause, and because of its refusal to comply with the Board's Order, or with the Court's Judgment enforcing it, and based upon Respondent's being found in civil contempt of the court's judgment, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Tom Rice Buick, Pontiac & GMC Truck, Inc., Huntington, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge because of their activities on behalf of the Union.

(b) Offering its employees a wage increase as an inducement to abandon their membership in, and activities on behalf of the Union.

(c) Failing and refusing to provide the Union with information it has requested.

(d) Delaying in the furnishing of requested information to the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately furnish the Union with the following information which it has requested and which has not been furnished:

1. A list of all service department employees who were terminated by Tom Rice Buick, Pontiac & GMC Truck, Inc., since October, 1996 for being late by 10 to 15 minutes.

2. A list of all service department employees who received written warnings for arriving late to start work.

(b) Within 14 days after service by the Region, post at its facility in Huntington, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge because of their activities on behalf of the Union.

WE WILL NOT offer our employees a wage increase as an inducement to abandon their membership in, and activities on behalf of the Union.

WE WILL NOT fail and refuse to provide the Union with information it has requested.

WE WILL NOTdelay furnishing requested information to the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately furnish the Union with the following information which it has requested and which has not been furnished:

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

A list of all service department employees who were terminated by Tom Rice Buick, Pontiac & GMC Truck, Inc., since October, 1996 for being late by 10 to 15 minutes.

TOM RICE BUICK, PONTIAC & GMC TRUCK, INC.